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# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, 1926

## No. 443

THOMAS MURPHY AND VINCENT MURPHY

*vs.*

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED JUNE 9, 1926

(32,010)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1926

[fo.] 1]

# IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3307, March Term, 1925

THOMAS MURPHY and VINCENT MURPHY, Defendants-Appellants,

vs.

UNITED STATES OF AMERICA, Complainant-Appellee

On Appeal from the District Court of the United States for the District of New Jersey

Before Buffington and Woolley, Circuit Judges, and Morris, District Judge

**Certificate to the Supreme Court**—Filed October 7, 1925

ORDER TO TRANSMIT QUESTION OF LAW

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and, under authority of Section 239 of the Judicial Code, certifies a question of law which arises from the following facts:

[fol. 2] STATEMENT OF FACTS

On a criminal information filed by the United States in the District Court for the District of New Jersey, charging a violation of Section 21 of Title II of the National Prohibition Act by the maintenance of a nuisance upon their premises, Thomas Murphy and Vincent Murphy were tried and acquitted. Thereafter the United States, under authority of Section 22 of Title II of the National Prohibition Act, filed a bill in equity in the same court against the same defendants, charging them upon the same facts with maintaining the same nuisance and praying that they be enjoined from using the premises as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of the Act and that the marshal be commanded to abate the nuisance by taking possession of all property used in connection therewith.

Early in the trial the defendants offered in evidence the record of their trial and acquittal in the criminal proceeding. It was admitted. At the end of the trial the defendants moved that the bill be dismissed on the ground that, as the records of the two proceedings showed identity of subjects matter and parties, the judgment of acquittal in the criminal proceeding is a bar to the civil suit, relying upon the law of United States vs. Coffey, 116 U. S. 436. The motion was opposed by the United States upon authority of United States vs. Stone, 167 U. S. 178 and Chantangco vs. Abaroa, 218 U. S. 476, and upon the reasoning of State vs. Roach, 83 Kas. 606, 112 Pac. 150, 31 L. R. A. (N. S.) 670. The court refused the motion and entered a decree abating the nuisance and enjoining the defendants from occupying or using the premises for one year. The defendants appealed.

[fol. 3] The question of law growing out of the aforegoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

QUESTION CERTIFIED

Is a judgment of acquittal on a criminal charge of maintaining a common nuisance in violation of Section 21, Title II of the National Prohibition Act a bar to a civil action brought under Section 22, Title II of the Act against the same parties to abate the same alleged nuisance?

Joseph Buffington, Circuit Judge. Victor B. Woolley, Circuit Judge. Hugh M. Morris, District Judge.

[File endorsement omitted.]

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[fol. 4] Clerk's certificate to foregoing papers omitted in printing.

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Endorsed on cover: File No. 32,010. U. S. Circuit Court of Appeals, Third Circuit. Term No. 443. Thomas Murphy and Vincent Murphy vs. The United States of America. (Certificate.) Filed June 9th, 1926. File No. 32,010.

FILE COPY

No. 443



# In the Supreme Court of the United States

FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1926

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THOMAS MURPHY AND VINCENT MURPHY

*v.*

THE UNITED STATES OF AMERICA

---

*On Certificate from the United States Circuit Court of Appeals for the Third Circuit*

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## BRIEF ON BEHALF OF THOMAS MURPHY AND VINCENT MURPHY

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THOMAS MURPHY,
VINCENT MURPHY.
*Per Se.*

Trent Press, Printing, 14 North Warren Street, Trenton, N. J.

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# In the Supreme Court of the United States

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*On Certificate from the United States Circuit Court of Appeals for the Third Circuit*

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## BRIEF ON BEHALF OF THOMAS MURPHY AND VINCENT MURPHY

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### OPINIONS BELOW

This case comes before the Court on Certificate from the Circuit Court of Appeals for the Third Circuit. The decision of the District Court has not been reported.

### JURISDICTON

Jurisdiction is conferred by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

### ORDER TO TRANSMIT QUESTION OF LAW

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the

Supreme Court, and, under authority of Section 239 of the Judicial Code, certifies a question of law which arises from the following facts:

## STATEMENT OF FACTS

On a criminal information filed by the United States in the District Court for the District of New Jersey, charging a violation of Section 21 of Title II of the National Prohibition Act by the maintenance of a nuisance upon their premises, Thomas Murphy and Vincent Murphy were tried and acquitted. Thereafter, the United States, under authority of Section 22 of Title II of the National Prohibition Act, filed a bill in equity in the same court against the same defendants, charging them upon the same facts with maintaining the same nuisance and praying that they be enjoined from using the premises as a place where intoxicating liquor is manufactured, sold, kept or bartered in violation of the Act and that the marshal be commanded to abate the nuisance by taking possession of all property used in connection therewith.

Early in the trial the defendants offered in evidence the record of their trial and acquittal in the criminal proceeding. It was admitted. At the end of the trial the defendants moved that the bill be dismissed on the ground that, as the records of the two proceedings showed indentity of subjects, matter and parties, the judgment of acquittal in the criminal proceeding is a bar to the civil suit, relying upon the law of *United States* v. *Coffey*, 116 U. S. 436. The motion was opposed by the United States upon authority of *United States* v. *Stone*, 167 U. S. 178 and *Chantangco* v. *Abaroa*, 218 U. S. 476, and upon the reasoning of *State* v. *Roach*, 83 Kas. 606, 112 Pac. 150, 31 L.R.A. (N.S.) 670. The court refused the motion and entered a decree abating the nuisance and enjoining the defendants from occupying

or using the premises for one year. The defendants appealed.

The question of law growing out of the aforegoing facts upon which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

### QUESTION CERTIFIED

Is a judgment of acquittal on a criminal charge of maintaining a common nuisance in violation of Section 21, Title II, of the National Prohibition Act, a bar to a civil action brought under Section 22, Title II of the Act, against the same parties to abate the same alleged nuisance?

JOSEPH BUFFINGTON,
*Circuit Judge.*
VICTOR B. WOOLEY,
*Circuit Judge.*
HUGH M. MORRIS,
*District Judge.*

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### POINT ONE

The question is therefore:

After a jury in the United States Court, having once found these defendants to be not guilty of certain specific charges, can the same charges and allegations again become the subject matter of another inquiry on the part of the Government against said defendants, even though the new action be a civil one.

Blakemore on Prohibition, Page 543, states:

"It is a universal view of the Federal Courts that a conviction of a person for breach of the Volstead Act is prerequisite to a forfeiture under Section 26 of this Act," and cites the following cases:

*The Saxon*, 269 Federal, 649.

*United States* v. *Slusser*, 270 Fed., 818.
*United States* v. *One Packard Motor Truck*, 284 Fed., 394.

However, the order of forfeiture need not be entered as a part of the convitcion, as such forfeiture and sale is ancillary and may be made subsequently. "*U. S.* v. *One Stephens Auto*, 272 Federal, 188." Thus it will be seen that a conviction must proceed a forfeiture, or no order of forfeiture may be made.

From this statement of the law it may be argued, that the Bill for Injujnction contains no prayer for a forfeiture. But let us see if the facts bear out this contention.

The Bill prays that the premises described therein be padlocked for the time required by law, while on the other hand, in a forfeiture proceeding, the owner is divested of his property and the condemned chattel reverts to the Government.

Thus, it must be concluded that the one is an absolute forfeiture, with reversion to the Government, while in the present case, the prayer, if allowed, is only limited or temporary in character and does not result in a permanent forfeiture to the Government.

Yet is not the principle the same? And do they not only differ in the amount of punishment or forfeiture? What difference does it make, in principle, whether an automobile or a still be forfeited to the United States, or his place, (a very valuable one in this case,) be padlocked for a year. Has not the Government forfeited any right of user in and to certain parts of the property for one year? Isn't he deprived of its use for a limited time at least? In view of this contention, it seems to me, especially under this statute, a conviction is pre-requisite before a forfeiture of any kind may be ordered. And it is a question whether there can be any forfeiture even though there be a conviction, where the

two transactions complained of are the same, that is, growing out of exactly the same transactions.

In case No. 15,688, *U. S.* v. *McKee.*

It was held "where the defendant was indicted, convicted and punished under Section 544 of the Revised Statute for conspiring with certain distillers to defraud the United States by the unlawful removal of distilled liquors from their distilleries, without the payment of taxes, *U. S.* v. *McKee*, (cases Nos. 15,685-15,686 and 15,687). In this present suit he was sued civilly, under Section 3296 of the Revised Statutes (15 Statutes 140) to recover the penalty of double the amount of the taxes of which the Government had been defrauded by means of said conspiracy, *the two transactions being the same*, it was held that the present suit for the penalty was barred by the judgment in the criminal case."

In this case there was a record of conviction and judgment entered on the record.

The Court in determining the case said, "In determining the sufficiency of this defense, it is necessary to ascertain clearly the nature of the offense charged in the indictment for which the defendant has been punished; for if it is the *same offense as defined by law*, for which he is now prosecuted and *is also for the same transaction*, our laws forbid that he or anyone else, shall be twice punished for the same crime or misdemeanor."

The Court further said: (26 Federal Case, Page 117) "We are, therefore, of opinion that if the *specific acts of removal on which this suit is brought are the same which are proved in the indictment the former judgment and conviction is a bar to the present action.*"

Thus it will be seen that the Court held that a person cannot be twice punished for the same offense or transaction. Certainly, then, if one has already been acquitted by the Court, he cannot be tried for the same transaction.

It will be observed that the Court said: "If it is to be for the same offense for which he is now tried and also for the same transaction, he cannot be twice punished."

Was not the same offense and same transactions charged in both the Bill for Injunction and the Information? They certainly were. The allegations in both are exactly alike.

(1) In both suits, a nuisance was alleged. In the criminal proceedings a nuisance was charged under Title 2, Section 21.

In the padlock proceedings, a nuisance was charged under Title 2, Sections 21 and 22 of an Act of Congress.

In both actions a violation or subjection was charged under Title 2, Section 21.

Can defendants be again subjected to punishment under Title 2, Sections 21 and 22, after they have already been acquitted of having violated Section 21, of this act.

It was further held in *Coffey* v. *United States* (Supreme Court Reports Book 29, page 684):

"A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of the defendants as claimant of the property involved. In a subsequent suit in rem, when, as against them, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property."

It will be noticed the Court said, "If they are for the same *acts or facts* involved in the criminal information."

By careful examnation of the information and bill for injunction, it will be found, they both contain the same charges and allegations. They both relate to the same sales of liquor on the same dates to the same persons, and under like circumstances.

It was urged in this case as a reason for not allowing such effect to the judgment, that the acquittal in the criminal

case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that on the same evidence on the question of preponderance of proof, there might be a verdict for the United States, in the suit in rem; nevertheless, the Court held "the *fact or act* has been put in issue and determined against the United States and all that is imposed by the Statute, as a consequence of guilt, is a punishment; therefore, there could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing with a difference only in the consequences following judgment against defendants."

The Court concluded by saying, "The doctrine is peculiarly applicable to a case like the present where, in both proceedings, criminal and civil, the United States is the party on one side, and this claimant the party on the other. The judgment of acquittal in the criminal proceedings ascertained that the facts which were the basis of that proceeding, are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once and for all, between the United States and claimant in the Criminal Proceedings so that the facts cannot again be litigated between them, as the basis of any statutory punishment denounces as a consequence of the existence of the facts. .

The decision in this case was put on the grounds that the defendant could not be twice punished for the same crime and that the former conviction and judgment were a bar to the suit for the penalty.

## POINT TWO

It may be said that the case of *State* v. *Roach*, 83 Kansas 606, is at variance with the Coffey Case. In that is was held in an action by the State to enjoin the maintenance of a place where intoxicating liquors are unlaw-

fully sold, it is error to render judgment for the defendant upon the ground that under the same evidence he had already been acquitted of a criminal charge of maintaining such a place. The Court then proceeds to point out why. Distinguishing the Coffey Case on two grounds:

First: The Coffey Case holds "The facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts.

Second: Because the degree of proof is different in the criminal and civil cases.

As to Point No. 1, Statutory punishment. Jurisdiction to padlock is by virtue of Statutory enactment. Jurisdiction to padlock is by virtue of Statutory authority, under Section 22, Title 2, of an Act of Congress, or there is no such right at all. There is no such right under State authority. See Case of *Hedden* v. *Hand*, 90 N. J. Eq. (C., E. & A. Case), page 5833.

In this case it was held "There existed no such right at Common Law, to abate a nuisance involving the commission of a crime, nor could such right be bestowed in a Court of Equity by legislative enactment.

The Court holding "That it is clear that if the Legislature may bestow on a Court of Chancery jurisdiction to grant an injunction and abate a public nuisance of a purely criminal nature, then there can be no valid argument against the power of the Legislature to confine the entire criminal code of this State to a Court of Equity for enforcement. It is apparent that a Court would render nugatory, the provisions of the Constitution which guarantees the right of a presentment of a Grand Jury and a trial by Jury to one accused of crime." And even the right of the Government to do so seems to be challenged in *U. S.* v. *Lot*, Vol. 296 Fed. Reports, 729.

Then the question naturally presents itself, is it statutory punishment? Does not the statute provide (Section 22) upon the judgment of the Court ordering such nuisance to be abated the Court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter.

Is this not statutory punishment?

What difference does it make to me in effect whether I be punished by a fine, or whether I be deprived of the use of a valuable building for one year. Are they not both a pecuniary loss to me and the effect the same, whether I lose, say, five hundred dollars by a fine, or probably two thousand dollars, by way of taking my property away from me for one year. The effect is the same.

In the criminal proceedings the court has the power, if the defendants had been convicted of maintaining a nuisance, of fining and imprisoning the defendants. In the civil case, on the same charge the court if it found the defendants guilty of maintaining a nuisance, could deprive them of the use of their property for one year. Two punishments growing out of the same offense. The offense for which defendants had already been acquitted on in an issue raised by the Government.

Point 2 relates to the degree of proof required as before set forth. The Coffey Case fully disposes of that case as already herein set forth. That is the fact or act has already been passed on; and found against the Government. The Government is thereby and thereafter estopped in raising the same issue between same parties in any future proceedings, whether civil or criminal.

Respectfully submitted,

THOMAS MURPHY,
VINCENT MURPHY.